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Ghasem Hozouri Hassan v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–209–10 OF 2015
RAUS SHARIF CHIEF JUSTICE, AHMAD MAAROP, ZAINUN ALI, RAMLY ALI AND AZAHAR MOHAMED FCJJ
17 MAY 2018

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Criminal Law — Appeal — Appeal against conviction and sentence — Appellant charged for offence of trafficking in dangerous drugs — High Court judge convicted appellant and sentenced him to death — Court of Appeal dismissed appellant's appeal and affirmed High Court's decision — Whether D *prosecution failed to prove exclusive possession — Whether prosecution failed to call or explain non-calling of material witness — Whether s 114(g) of the Evidence Act 1950 ought to be invoked — Whether Court of Appeal failed to apply and/or applied improperly Radhi direction — Whether there was misdirection by High Court and Court of Appeal in the handling and application of presumptions under* E *the DDA — Dangerous Drugs Act 1952 ss 37(d), (da) & 39B(1)(a), (2) — Evidence Act 1950 s 114(g)*

The appellant was charged for an offence of trafficking in dangerous drugs, to wit 49,621.8g of methamphetamine, an offence under s 39B(1)(a) of the F Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the same Act. The offence was committed in a premise known as No 45–2–6, The Forum, Jalan Inai, Dang Wangi, Wilayah Persekutuan Kuala Lumpur ('the said premises'). At the end of the prosecution's case, the learned High Court judge held that the prosecution had succeeded in proving that the appellant had G custody and control over the said premises given his conduct of freely entering and leaving the premises. The learned judge also stated that the appellant's fingerprints which was found on one of the drug packages was evidence of his knowledge of the drugs. Therefore, actual possession was made out and the presumption of trafficking pursuant to s 37(da) of the DDA was invoked. The H appellant was thus called upon to enter his defence. In essence, the appellant's defence was that the true tenant of the said premises was Javad @ Hasen Tiren ('Javad'), as such, Javad was the real trafficker. The appellant was merely at the said premises temporarily as he had an argument with his girlfriend Samaneh Momen ('Samaneh'). The appellant further claimed that he had no knowledge I that the impugned drugs were in fact methamphetamine as he had believed Javad's explanation that they were hair product from Iran called Katira. At the end of the defence case, the learned judge found that the appellant had failed to cast a reasonable doubt on the prosecution's case and held that the appellant's defence was a mere denial and an afterthought. The learned judge then

convicted the appellant as charged and sentenced him to death. The Court of Appeal had dismissed the appellant's appeal and affirmed the High Court's decision, hence, the present appeal. The issues to be decided were: (a) the prosecution's failure to prove exclusive possession; (b) the prosecution's failure to call or explain the non-calling of Javad and Samaneh; (c) the failure of the Court of Appeal to apply and/or applied improperly the *Radhi* direction which was propounded by the Supreme Court in the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; and (d) misdirection in the handling and application of presumptions under the DDA.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Based on the pronouncement of the Federal Court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194, possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property (see para 27).

(2) The witnesses called by the prosecution were sufficient in proving the essential elements of custody, control and knowledge. Taken together they provided a complete narrative of facts which established actual possession. The prosecution was able to prove that the appellant had free access to and from the said premises (showing custody or control); that he had been staying there for almost a week (showing custody or control); and that the keys to the premises' main door and door to the first bedroom were found in his bag containing his passport (showing custody or control). The element of knowledge could be inferred from the fact that the large quantity of drugs was at all timed in the appellant's plain view. This was further reinforced by the fact that the appellant's fingerprints were found on one of the incriminating packages (see para 37).

(3) To draw an adverse inference against the prosecution, the court must be satisfied that the witness that was not offered was a material witness, the prosecution purposely withhold evidence which it possessed, and which was always available, and that what the prosecution did was done with an ulterior motive to frustrate the defence. Applying the above principles to the present case, the court was satisfied that there was no evidence to suggest even the slightest inkling that the prosecution withheld testimonies by Javad and Samaneh in a deliberate scheme to impair the truth or frustrate the appellant's defence. On the facts of the present case, adverse inference under s 114(g) of the Evidence Act 1950 could not be invoked against the prosecution (see paras 48–50).

(4) The separate exercise in *Radhi* direction was surely not an exercise to determine the real trafficker but it was an exercise by the court to consider

whether on a balance of probability on the evidence, the defence had rebutted the statutory presumption of trafficking under s 37(da) of the DDA as a separate exercise even though the court was satisfied on a balance that the presumption of possession under s 37(d) of the DDA had not been rebutted. This certainly had nothing to do with the court having to determine the real trafficker (see para 65).

(5) The Court of Appeal was right in emphasising in its judgment that the interpretation of s 39B(2) of the DDA did not require the court to consider the issue of a real trafficker as it was only concerned with whether or not the appellant himself was a trafficker. Even if the Court of Appeal had administered the *Radhi* direction correctly, the evidence available failed to rebut the trafficking presumption under s 37(da) of the DDA on a balance of probabilities, that the appellant was simply a victim of unfortunate circumstances and a mere possessor, whilst Javad was the trafficker of all the drugs found at the said premises. The mere fact that Javad was the official tenant of the said premises could not exonerate the appellant of the charge of trafficking of the said drugs. In the present case, there was no single corroborating witness to the appellant's contention that Javad was the owner and hence the trafficker of the drugs (see paras 66 & 71–73).

(6) The court was satisfied that the Court of Appeal had referred time and time again to the prosecution's proof of actual knowledge. The said finding was based on the objective assessment of facts. The Court of Appeal being an appellate arbiter took pains to analyse the judgment and findings of the High Court on knowledge and presumption of trafficking under s 37(da) of the DDA. Contrary to what was submitted by learned counsel for the appellant, the court found that there was no misdirection on the part of the learned trial judge in handling and applying the presumptions under the DDA (see paras 82–84).

[Bahasa Malaysia summary

Perayu didakwa atas kesalahan mengedar dadah berbahaya, iaitu 49,621.8g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) Akta yang sama. Kesalahan tersebut dilakukan di premis yang dikenali sebagai No 45–2–6, The Forum, Jalan Inai, Dang Wangi, Wilayah Persekutuan Kuala Lumpur ('premis tersebut'). Di akhir kes pendakwaan, hakim Mahkamah Tinggi yang bijaksana berpendapat bahawa pihak pendakwa telah berjaya membuktikan bahawa perayu memiliki jagaan dan kawalan ke atas premis tersebut memandangkan kelakuannya yang secara bebas memasuki dan meninggalkan premis tersebut. Hakim yang bijaksana juga menyatakan bahawa cap jari perayu yang ditemui pada salah satu bungkusan dadah adalah bukti pengetahuannya terhadap dadah tersebut. Oleh itu, pemilikan sebenar telah dibuktikan dan anggapan pengedaran menurut s 37(da) ADB telah

digunapakai. Oleh itu, perayu diminta memasuki pembelaannya. Pada dasarnya, pembelaan perayu adalah bahawa penyewa sebenar premis tersebut adalah Javad @ Hasen Tiren ('Javad'), oleh itu, Javad adalah pengedar sebenar. Perayu hanya di premis tersebut buat sementara waktu kerana dia bertengkar dengan teman wanitanya Samaneh Momen ('Samaneh'). Perayu seterusnya mendakwa bahawa dia tidak mengetahui bahawa dadah tersebut sebenarnya methamphetamine kerana dia percaya penjelasan Javad bahawa ianya adalah produk rambut dari Iran yang dipanggil Katira. Di akhir kes pembelaan, hakim yang bijaksana mendapati bahawa perayu telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan dan berpendapat bahawa pembelaan perayu hanyalah penafian semata-mata dan sesuatu yang difikirkan kemudian. Hakim yang bijaksana kemudiannya telah mensabitkan perayu seperti yang didakwa dan menjatuhkan hukuman mati ke atasnya. Mahkamah Rayuan telah menolak rayuan perayu dan mengesahkan keputusan Mahkamah Tinggi, oleh itu, rayuan semasa. Isu-isu yang perlu diputuskan ialah: (a) kegagalan pihak pendakwaan untuk membuktikan pemilikan eksklusif; (b) kegagalan pihak pendakwaan untuk memanggil atau menjelaskan kegagalan memanggil Javad dan Samaneh; (c) kegagalan Mahkamah Rayuan untuk menggunapakai dan/atau menggunapakai secara tidak wajar '*Radhi* direction' yang diutarakan oleh Mahkamah Agung di dalam kes *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; dan (d) salah arah dalam pengendalian dan penggunaan anggapan di bawah ADB.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Berdasarkan pernyataan Mahkamah Persekutuan di dalam kes *Public Prosecutor v Denish a/l Madhavan [2009] 2 MLJ 194*, pemilikan tidak perlu eksklusif kepada tertuduh. Dua atau lebih orang boleh berada dalam pemilikan bersama. Elemen eksklusif pemilikan bermakna bahawa pemilik atau pemilik-pemilik mempunyai kuasa untuk mengecualikan orang lain daripada menikmati harta tersebut (lihat perenggan 27).

(2) Saksi-saksi yang dipanggil oleh pihak pendakwaan adalah mencukupi dalam membuktikan unsur-unsur penting dalam jagaan, kawalan dan pengetahuan. Secara keseluruhan mereka menyediakan naratif fakta yang lengkap yang membuktikan pemilikan sebenar. Pihak pendakwaan berjaya membuktikan bahawa perayu mempunyai akses bebas ke dalam dan dari premis tersebut (menunjukkan jagaan atau kawalan); bahawa dia telah tinggal di sana selama hampir seminggu (menunjukkan jagaan atau kawalan); dan kunci ke pintu utama premis dan pintu ke bilik tidur pertama ditemui di dalam begnya yang mengandungi pasportnya (menunjukkan jagaan atau kawalan). Unsur pengetahuan dapat disimpulkan dari fakta bahawa jumlah dadah yang banyak tersebut pada setiap masa adalah berada dalam pandangan mata kasar perayu. Ini diperkuat lagi dengan hakikat bahawa cap jari perayu ditemui pada salah

satu bungkusan dadah tersebut (lihat perenggan 37).

(3) Untuk membuat anggapan bertentangan terhadap pendakwaan, mahkamah mesti berpuas hati bahawa saksi yang tidak ditawarkan adalah saksi material, pendakwaan sengaja menahan bukti yang dimilikinya, dan yang selalu ada, dan apa yang dilakukan pihak pendakwaan tersebut dilakukan dengan motif tersembunyi untuk mengecewakan pembelaan. Menggunapakai prinsip-prinsip di atas untuk kes semasa, mahkamah berpuas hati bahawa tidak ada keterangan untuk mencadangkan walaupun sedikit fakta bahawa pendakwaan menyembunyikan keterangan oleh Javad dan Samaneh dalam perancangan untuk menjejaskan kebenaran atau mengecewakan pembelaan perayu. Berdasarkan fakta kes semasa, anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 tidak boleh digunapakai terhadap pendakwaan (lihat perenggan 48–50).

(4) 'Separate exercise' dalam '*Radhi* direction' pastinya bukan satu proses untuk menentukan pengedar sebenar tetapi ia adalah proses oleh mahkamah untuk mempertimbangkan sama ada pada imbangan kebarangkalian bukti, pembelaan telah mematahkan anggapan berkanun pengedaran di bawah s 37(da) ADB sebagai satu proses yang berasingan walaupun mahkamah berpuas hati di atas imbangan bahawa anggapan pemilikan di bawah s 37(d) ADB tidak berjaya dipatahkan. Ini tentunya tiada kaitan dengan mahkamah yang perlu menentukan pengedar sebenar (lihat perenggan 65).

(5) Mahkamah Rayuan adalah tepat apabila menekankan di dalam penghakimannya bahawa tafsiran s 39B(2) ADB tidak menghendaki mahkamah untuk mempertimbangkan isu pengedar sebenar kerana ia hanya berkenaan dengan isu sama ada atau tidak perayu itu sendiri adalah seorang pengedar. Sekalipun Mahkamah Rayuan telah menggunakan '*Radhi* direction' dengan betul, bukti yang ada gagal untuk mematahkan anggapan pengedaran di bawah s 37(da) ADB di atas imbangan kebarangkalian, bahawa perayu hanya menjadi mangsa keadaan malang dan hanya pemilik, sementara Javad adalah pengedar semua dadah yang dijumpai di premis tersebut. Hakikat bahawa Javad adalah penyewa rasmi premis tersebut tidak dapat melepaskan perayu dari tuduhan pengedaran dadah tersebut. Dalam kes semasa, tidak ada satu saksi yag boleh menyokong dakwaan perayu bahawa Javad adalah pemilik dan oleh itu pengedar dadah tersebut (lihat perenggan 66 & 71–73).

(6) Mahkamah berpuas hati bahawa Mahkamah Rayuan telah beberapa kali merujuk kepada keterangan pendakwaan tentang pengetahuan sebenar. Dapatan tersebut adalah berdasarkan penilaian objektif fakta. Mahkamah Rayuan sebagai pengadil rayuan bersusah payah untuk menganalisis penghakiman dan penemuan Mahkamah Tinggi mengenai pengetahuan dan anggapan pengedaran di bawah s 37(da) ADB.

Bertentangan dengan apa yang dihujahkan oleh peguam perayu yang terpelajar, mahkamah mendapati bahawa tidak ada salah arah di pihak hakim bicara yang bijaksana dalam mengendalikan dan menggunapakai anggapan di bawah ADB (lihat perenggan 82–84).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Chiu Nang Hong v PP [1963] 1 MLJ 119, CA (refd)
Ibrahim Mohamad & Anor v PP and another appeal [2018] Supp MLJ 280; [2011] 1 MLRA 181, FC (distd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 207; [1991] 1 MLRA 158, SC (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Nanda Kumar a/l Kunyikanan & Anor v Pendakwa Raya [2011] MLJU 1566; [2011] 8 CLJ 406, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 1 MLRA 568, FC (folld)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (folld)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 MLRA 99, FC (folld)
Sochima Okoye v PP [1995] 1 MLJ 538; [1995] 3 CLJ 371, CA (not folld)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2000] 1 MLRA 800, FC (refd)
Yee Wen Chin v PP [2008] 6 MLJ 222; [2008] 2 MLRA 382, CA (not folld)

Legislation referred to

Courts of Judicature Act 1964 ss 60(1), 92(1)
Dangerous Drugs Act 1952 ss 2, 6, 12(2), 37(d), (da), (da)(vi), 37A, 39A(1), (2), 39B, (1)(a)
Evidence Act 1950 ss 40, 114(g)

Appeal from: Criminal Appeal No W-05–63–03 of 2014 (Court of Appeal, Putrajaya)

Shafee Abdullah (Rahmat Hazlan with him) (Shafee & Co) for the appellant.
Norinna Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Raus Sharif Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged in the High Court Kuala Lumpur for an offence of trafficking in dangerous drugs, to wit 49,621.8g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act ('the DDA'). The charge reads as follows:

> Bahawa kamu pada 5 April 2011, jam lebih kurang 5.30 petang di alamat No 45-2-6, The Forum, Jalan Inai di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 49,621.8 gram methamphetamine. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] On 1 February 2014, the High Court found the appellant guilty of the offence as charged. He was convicted and sentenced to death. On 22 September 2015, the Court of Appeal dismissed the appellant's appeal and affirmed the conviction and sentence imposed by the High Court. On further appeal, this court dismissed the appellant's appeal. We now give our reasons.

The prosecution's case

[3] The prosecution's case may be summarised as follows. On 5 April 2011 at about 1pm, Insp Ihwan Hilmi ('PW10') gave a briefing to a team of police officers of an alleged drug trafficking activity taking place at 45–2–6, The Forum, Jalan Inai, Kuala Lumpur ('the said premises'). After the briefing, PW10 and his men carried out surveillance on the said premises from a parking lot at Menara AA which is a building adjacent to the said premises.

[4] At around 3.15pm, PW10, from 30–40 meters away, saw a man wearing a grey t-shirt and blue jeans later identified as the appellant, entering the said premises. Ten minutes later, around 3.24pm, the appellant was seen exiting the said premises carrying with him a sling bag.

[5] Around 4.10pm, PW10 saw the appellant entering the said premises again carrying with him the same sling bag and thereafter left the said premises at about 4.55pm, this time not only with the same sling bag but with a luggage bag. The appellant then re-entered the said premises around 5.25am with only the said sling bag with him.

[6] PW10 then alerted his men and rushed to the said premises. Upon reaching there, PW10 knocked on the metal grill for about a minute,

instructing whoever was inside to open the door. As there was no response, PW10 instructed his men to pry open the metal grill. Upon prying open the metal grill, PW10 entered the said premises as the wooden door was unlocked. Inside, PW10 and his men saw the appellant at the kitchen area. PW10 then successfully effected arrest on the appellant but not without some physical resistance from the appellant.

[7] A search was then conducted on the said premises and the following incriminating items were found in the first bedroom which was not locked:

(a) a sling bag (P44) that the appellant was seen carrying earlier and in it:

  (i) the appellant's passport (P42);

  (ii) a set of four keys, one of which unlocked the grille of said premises (the other three not compatible with any of the doors on the premises); and

  (iii) one access card to the said premises (P35B);

(b) 45 translucent plastic packages that contained crystalised powdery substances suspected to be methamphetamine found on the floor at the end of the bed;

(c) crystal like powdery substances suspected to be methamphetamine engulfed by an aluminum foil on the table; and

(d) one weighing machine of the brand 'Soehnle' on the dressing table.

[8] As for the second bedroom, the door was locked and none of the keys found in the sling bag could unlock the door. PW10 broke down the door and discovered that the lights and air-conditioning in it were switched on. The following incriminating items were found in the second bedroom:

(a) one weighing machine of the brand 'Constant' on the dressing table;

(b) two translucent plastic packages with the word 'Reynolds' on it containing brown powdery substances suspected to be methamphetamine on the floor beside the dressing table; and

(c) one tenancy agreement of the said premises, one access card, one car sticker for PJB 1740 in a drawer of the dressing table.

[9] The keys to the second bedroom was later found on the top ceiling of the bathroom near the second bedroom. The incriminating items above were sent to the Jabatan Kimia Malaysia by ASP Chandra Segaran (PW18) for the purposes of chemical analysis. Upon completion of chemical analysis, the chemist, Suhana Ismail (PW6) confirmed in her chemist report (P32) that the

incriminating drug items seized from the first and second bedroom were indeed dangerous drugs, namely, 49,621.8g of methamphetamine.

[10] Forensic analysis also revealed the following:

(a) the appellant's fingerprints on one of the translucent plastic packages (P8) found in the first bedroom and the red water jug (P74) found in the kitchen;

(b) the sppellant's DNA on a pink towel (P64A) and a comforter (P65A) found on the bed of the first bedroom;

(c) the appellant's DNA on a purple toothbrush (P58A) and a multi colored towel (P60A) found in the second bathroom which was not connected to any room;

(d) the DNA of other individuals on the pink towel (P64A) found in the first bedroom, namely the DNA of Samaneh Momen (P70A) and the DNA of an unknown contributor identified as 'Male X';

(e) the DNA of 'Male X' on a pink/white towel (P64A) and a blue/white towel (P61A) recovered from the second bathroom, as well as from another pink towel (P63A) recovered from the first bedroom;

(f) the DNA of an unknown female on the purple toothbrush (P58A) found in the second bathroom; and

(g) the fingerprint of an unidentified individual on one of the translucent plastic packages found in the first bedroom.

[11] At the end of the prosecution's case, the learned trial judge found that the prosecution had succeeded in proving a prime facie case against the appellant. The learned trial judge held that the prosecution had succeeded in proving that the appellant had custody and control over the said premises given his conduct of freely entering and leaving the premises. Secondly, the learned trial judge stated that the appellant's fingerprints found on one of the drug packages was evidence of his knowledge of the drugs. Thus, actual possession was made out and the presumption of trafficking pursuant to s 37(da) of the DDA was invoked. Accordingly, the appellant was called upon to enter on his defence.

The defence case

[12] The appellant presented his case in the form of a sworn evidence. It was his defence that the said premises belonged to Javad @ Hasan Tiren and he was at the said premises only by Javad @ Hasan Tiren's invitation. He claimed that he was there because he and Samaneh Momen, a woman he was seeing at the

time, had quarreled. He earlier stayed with Samaneh Momen in a room at A1, Jalan Stonor. The rental of the room was arranged by Javad @ Hassan Tiren.

[13] One week before 29 March 2011, the appellant had a quarrel with Samaneh Momen and therefore requested Javad @ Hasan Tiren for another place to stay. Javad @ Hasan Tiren invited him to stay at the said premises. On 29 March 2011 he met Javad @ Hasan Tiren at the lobby of the said condominium as recorded and captured in CCTV images.

[14] During that time Javad @ Hasan Tiren gave a red access card (P35B) and duplicate keys to the said premises together with a bag to the appellant. According to the appellant he inquired from Javad @ Hasan Tiren of the contents of the said bag. Javad @ Hasan Tiren replied by telling him that it contained his personal belongings and thus requested the appellant to take it with him to the said premises.

[15] Upon entering the said premises, the appellant discovered that there were three bedrooms. He then entered into the first bedroom and saw the plastic packages (P8(1–30) and P9(31–45)) on the floor. He immediately called Javad @ Hasan Tiren to inquire the contents of the packages. He was informed by Javad @ Hasan Tiren that the said packages contained 'Katira' which was an Iranian hair care product. He believed the explanation given by Javad @ Hasan Tiren as Katira. Thus, the appellant alluded that he was not aware at all of the said plastic packages allegedly contained drugs.

[16] According to the appellant, from 29 March–5 April 2011, Samaneh Momen visited the said premises at least two to three times to persuade him to move back to his rented room in A1, Jalan Stonor. When the appellant was arrested, he told the police about Samaneh Momen as well as Javad @ Hasan Tiren. According to the appellant, he met both Samaneh Momen and Javad @ Hasan Tiren at the Bukit Aman police station whereby the two of them were also arrested.

[17] Upon being shown the picture on the passport of the tenancy agreement as well as CCTV images 1, 2, 3 and 43 (P53), the appellant confirmed that those persons were in fact Javad @ Hasan Tiren. The property agent, Tham Tong Keen (SP7) who had seen Javad @ Hasan Tiren about three or four times verified that the person in CCTV image 43 (P53) was in fact Javad @ Hasan Tiren.

[18] Essentially, the defence undertaken by the appellant was that the true tenant of the said premises was Javad @ Hasen Tiren. As such, Javad @ Hasan Tiren was the real trafficker. The appellant was merely at the said premises temporarily as he had an argument with his girlfriend Samaneh Momen.

Accordingly, he claimed that he had no knowledge that the impugned drugs were in fact methamphetamine as he had believed Javad @ Hasan Tiren's explanation that they were hair product from Iran called Katira.

[19] At the end of defence case, the learned trial judge found that the appellant had failed to cast a reasonable doubt on the prosecution's case and held that the appellant's defence was merely a bare denial and an afterthought. Accordingly, the learned trial judge convicted the appellant as charged and sentenced him to death.

At the court of appeal

[20] The Court of Appeal unanimously dismissed the appellant's appeal and affirmed the conviction and sentence imposed by the High Court. The Court of Appeal rejected the appellant's defence of 'no knowledge'. Essentially, the Court of Appeal agreed with the High Court that the appellant had custody and control over the drugs and had actual knowledge of the drugs found at the said premises. It went on to state that the appellant had also failed to rebut the presumption of trafficking under s 37(da) of the DDA. In short, the Court of Appeal found that the prosecution had established its case against the appellant beyond reasonable doubt.

Submissions

[21] Before us, counsel for the appellant advanced four broad issues in support of this appeal and they were as follows:

(a) the prosecution failed to prove exclusive possession given that there was sufficient proof of the existence of Javad @ Hasan Tiren and Samaneh Momen. Learned counsel emphasised that the prosecution failed to discharge its onus of proving that the appellant had *exclusive use of said premises* and that the appellant had *exclusive possession over the drugs* found therein. In the absence of evidence by the prosecution showing that the appellant had use of said premises and possession over the drugs to the exclusion of others, the prosecution had failed to establish a prima facie case against the appellant under s 39B(1)(a) of the DDA. To this end, learned counsel cited as authority the judgment by Zulkefli Makinudin FCJ (as he then was) in *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] Supp MLJ 280; [2011] 1 MLRA 181;

(b) the prosecution failed to call or explain the non-calling of Javad @ Hasan Tiren and Samaneh Momen. Learned counsel for the appellant argued that the failure on the part of the prosecution to call material witnesses, namely Javad and Samaneh Momen had resulted in 'huge gaps' in the prosecution's case. In light of this, counsel submitted that an adverse

inference pursuant to s 114(g) of the Evidence Act 1950 should be invoked against the prosecution;

(c) the courts below failed to apply and/or applied improperly the *Radhi* direction (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 MLRA 158) in response to the appellant's defence that Javad @ Hasan Tiren was 'the real trafficker' and that the appellant was a mere possessor. Learned counsel emphasised that whenever such a defence is taken, two separate exercises must be carried out by the learned trial judge. He must first determine as a fact whether that other person mentioned is a real person or a mere figment of the accused person's imagination invented for the purpose of the trial. Next, if he finds that other person to be real, the judge must then determine whether that other person is the real trafficker. The case of *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 2 MLRA 382 was cited as the authority for the said proposition; and

(d) there was misdirection on the part of the learned trial judge in handling and application of presumptions under the DDA. Learned counsel submitted that based on the grounds of judgment of the High Court, it appears that the learned trial judge had made a finding of actual possession although it was not clear what were the facts which he relied on in establishing that the appellant had knowledge of the impugned drugs. Nowhere was it shown that the learned trial judge relied on the presumption under s 37(d) of the DDA to presume knowledge. Having made a finding of actual possession, the learned trial judge then relied on the presumption under s 37(da) of the DDA to prove trafficking. In similar vein, the Court of Appeal in its grounds of judgment was vague as to whether the case was one of actual possession/trafficking or presumed possession/trafficking. Learned counsel emphasised that both actual and presumed possession and trafficking were relied on indiscriminately thus creating a confusion for the appellant as to whether he was placed with a legal burden or an evidential burden to disprove possession and trafficking.

FINDINGS

Issue 1

The prosecution's failure to prove exclusive possession

[22] In addressing this issue raised, we are minded of the decision of this court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194. In *Denish a/l Madhavan*, the accused was arrested during a raid by customs officers of a rented house in Johor Bahru. At the time of the raid the accused was in his room with two other persons. Upon gaining entry into the house the customs

officers conducted a body search of the accused and the two other persons and then a search of the room occupied by the party. During the search the officers found a plastic film case on the floor of the room, which was found to contain what was later proved to be 8.2685g of cannabis. After finding the plastic film case the officer in charge of the raid administered to the accused the caution under s 37A of the DDA. The officer in charge then asked the accused the whereabouts of any other cannabis and although the accused was silent at first, after repeated questioning he replied that it was under the bed. The accused then brought out three bags from under his bed and each bag was found to contain among other things a slab of what proved in total to be 3,121g of cannabis. The accused was then charged with trafficking in 3,121g of cannabis. During the raid the officers also found cannabis in the room adjoining the accused's room, which was occupied by one Ibrahim or 'Boy'. This was however not the subject of the charge against the accused.

[23] The essential and basic finding of the learned trial judge in that case was that the accused was in possession of the cannabis that was the subject of the charge, in that, he had custody or control of the cannabis with the knowledge of what it was. The trial judge also used the evidence of the other two other prosecution witnesses to establish that the house was a center of drug-dispensing and drug-consuming activities and this in turn together with the accused's statement that the cannabis was under the bed reinforced his finding as to knowledge. Therefore, by reason of the amount of drugs involved the learned trial judge invoked the presumption under s 37(da) of the DDA and held that the accused was guilty of trafficking in the cannabis.

[24] The accused's defence was that he had no knowledge of the presence of the cannabis in his room and that therefore in law he was not in possession of it. He sought to establish his defence by relying in or resorting to evidence to show that 'Boy' was still in occupation of the other room and that another person had a set of keys and therefore had access to the house and his room. The question of others having access to the accused's room was considered by the learned trial judge but after evaluating all the evidence the learned trial judge held that this evidence was not sufficient 'to negate the proof of exclusive possession'.

[25] The accused appealed to the Court of Appeal. The appeal was allowed. The conviction and sentence for trafficking was set aside and substituted with a conviction for the offence of possession. In arriving at this conclusion, the Court of Appeal held, inter alia, that exclusive possession had not been proven as there was gap in the prosecution's case in that 'Boy' and another had access to the house and the accused's room.

[26] The prosecution appealed to this court. The prosecution's appeal was allowed. The decision of the High Court was reinstated. Abdul Aziz Mohamed FCJ speaking for this court held that it was inappropriate to speak of possession of an article in criminal law as exclusive procession. He explained:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
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> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28:
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> > … It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
> >
> > Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.
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> [18] Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed, at p 304) in which the exclusive element mentioned by Taylor J appears:
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> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> [19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[27] Based on the pronouncement of this court in *Denish a/l Madhavan* as reproduced above, possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property. Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.* (Emphasis added.)

[28] Similarly, in the case of *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 MLRA 99 the issue pertaining to the failure by the prosecution to prove exclusive possession of the proscribed drugs was again an issue. In that case learned counsel for the accused capitalised on the fact that some ladies' clothing were found in the first house where part of the drugs were found. He therefore contended that others like the accused's wife had access to the first house in which the proscribed drugs were found. Learned counsel contended that the prosecution should have called her to exclude her as having access to the house and that the failure by the prosecution to do so resulted in its failure to prove exclusive possession or occupation of the first house by the accused resulting in the failure to prove exclusive possession of the proscribed drugs by the accused.

[29] Ahmad Maarop FCJ (as he then was) in analysing the issue of exclusive possession echoed the following sentiments:

> [34] In explaining the meaning of possession, in the off-cited case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 (cited with approval by this court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 and in *Public Prosecutor v Denish a/l Madhavan*) Thomson J said:
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> > 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
> >
> > > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
> >
> > *To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do*

so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so. (Emphasis added.)

[30] In *Siew Yoke Keong* this court held that the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house did not mean that no possession was established against the accused. The crucial question was whether accused was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances were such that he may be presumed to intend to do so in case of need.

[31] Thus, from the above, when we talk about the issue of custody and control what is crucial is that the accused must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had *animus possidendi*). The intention to deal with the drugs here refer to the element of knowledge.

[32] We must not lose sight of the fact that more often than not the accused claims ignorance of the drugs to rebut/negate the element of knowledge. Thus, in the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[33] In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 1 MLRA 568 Arifin Zakaria FCJ (as he then was) in referring to cases from the Singapore and the English apex courts alluded as follows:

[18] In *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, the Singapore Court Appeal again propounded on the question of knowledge necessary to establish possession and at p 541 states:

> Knowledge of drugs
>
> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.
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> In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978–1979] SLR 211 at pp 217–218; [1980] 1 MLJ 49 at p 52):
>
> > Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

[19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In *Warner* the following question was posed to Their Lordships:

> Whether for the purpose of section 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware if its true nature.

[20] At p 367 Lord Reid addressed the issue as follows:

> The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

[21] In the same case Lord Morris answered the question in following manner:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[34] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the appellant knew about the incriminating items found in the first bedroom as well as in the second bedroom. It is not in dispute that he was alone in the said premises at the material time. No doubt that the second bedroom was locked and none of the keys found with the appellant can be used, but it is pertinent to note that the air conditioner and the light were on. Later, the keys to the second bedroom were found near the bathroom in front of the second bedroom. Further, during surveillance the appellant was seen coming in and out from the said premises. What is more glaring was the fact that the keys to the main grill of the said premises were recovered from the appellant. The key card and the keys to the first bedroom were found in the sling bag which the appellant was seen carrying all the time. The next point which has a strong bearing on the issue is the evidence of PW7, the property agent who identified the appellant as the one who rented the said premises. All things considered, PW7's evidence when is viewed in its entirety showed that the appellant had care and management over the said premises at that material time.

[35] In such a situation, the appellant 'has the power to exclude other persons from the enjoyment of the property'. Even more to the point is the fact that the appellant's finger prints which were found on one of the incriminating packages. Further, the appellant's DNA was found on the other items such as on a pink towel (P64A) and a comforter (P65A) found on the bed of the first bedroom and on a purple toothbrush (P58A) and a multi coloured towel (P60A) found in the second bathroom.

[36] In our judgment, all this admissible evidence when taken together lead to the conclusion that at all material time, the offending drugs were in the

custody and control of the appellant. The irresistible inference that must be drawn in the circumstances was that the appellant all along knew about the drugs found in the said premises.

[37] To recapitulate, based on the above narrative, we find that the witnesses called by the prosecution were sufficient in proving the essential elements of custody, control, and knowledge. Taken together they provide a complete narrative of facts which established actual possession. The prosecution was able to prove that the appellant had free access to and from said premises (showing custody or control); that he had been staying there for almost a week (showing custody or control); that the keys to the premises' main door and door to the first bedroom were found in his bag containing his passport (showing custody or control). The element of knowledge can be inferred from the fact that the large quantity of drugs were at all times in the appellant's plain view. This was further reinforced by the fact that the appellant's fingerprints were found on one of the incriminating packages.

[38] Now, for completeness we must also deal with the heavy reliance placed by the appellant on the case of *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* to negate the element of possession. In that case, the police acting on a tip-off apprehended the first and second accused ('both accused') at a road block during the inspection of a vehicle driven by the first accused. It was subsequently discovered that the back seat rest of the vehicle contained 40 transparent plastic packages of cannabis. Both accused were then tried, convicted and sentenced to death under s 39B(1)(a) of the DDA for trafficking in 38,499.68g cannabis.

[39] In that case, the police raiding party led by PW4 acting on information received, stopped a car bearing the registration number CAC 9493 ('the vehicle') which was travelling from Jeli along KM100 of Kota Bharu/Grik road on 8 November 1999. The driver (the first accused) and the passenger (the second accused) ran away during the inspection of the said vehicle by PW4. Both accused were subsequently apprehended. Both the accused and the vehicle were brought to PW4's office and upon further inspection PW4 discovered 40 transparent plastic packages suspected to be cannabis at the back seat rest of the vehicle. The chemist ('PW1') upon analysis confirmed these 40 transparent plastic packages contained cannabis as defined under s 2 of the DDA.

[40] The learned trial judge in that case at the conclusion of the trial convicted both the accused and held that the prosecution had proved beyond reasonable doubt that both the accused were in possession of the said drugs and the element of trafficking was proved by virtue of the fact that the weight of the said cannabis exceeded the statutory threshold under s 37(da)(vi) of the DDA.

The Court of Appeal in affirming the decision of the High Court had, inter alia, made the pertinent findings against both the accused that they were in custody and control of the said drugs by virtue of being in custody and control of the vehicle and that they had the knowledge of the said drugs by virtue of their conduct in running away from the scene of the crime.

[41] Before this court, both the accused focused their arguments on the question of whether on the evidence adduced by the prosecution it can safely be concluded that both the accused had mens rea possession of the drugs in the vehicle, independent of the statutory presumption under s 37(d) of the DDA. It is pertinent to note that in that case the only evidence which the learned trial judge had relied upon in order to conclude that both the accused were in custody or control of the drugs were as follows:

(a) that the first accused was the driver of the vehicle and the second accused was the passenger on the date of the arrest; and

(b) that the second accused was previously summoned for driving the same vehicle without licence in Kulim, Kedah on 14 May 1999, about six months prior to the date of his arrest in the present case.

[42] This court allowed both appeals. The convictions and sentences under s 39B(1)(a) of the DDA were set aside and substituted with one of possession under s 6 of the DDA, punishable under s 39A(2) of the DDA. Zulkefli Ahmad Makinudin FCJ (as he then was) in delivering the judgment of this court held that the prosecution had failed to prove the element of possession on the part of both the accused persons. Notwithstanding the fact that the first accused and the second accused were in the vehicle when it was stopped at the road block for inspection, neither the first accused nor the second accused was the registered owner of the vehicle. The owner of the said vehicle was one, Mohd Zainuddin bin Tolan ('Zainuddin'), who was never called to testify as a prosecution witness. The courts below had concluded that the second accused had custody and control over the drugs on the mere facts that he was a passenger of the vehicle on the date of arrest without and the fact that several months prior to the date of arrest the second accused was summoned for driving the same vehicle without a licence in Kedah. This is further compounded by the fact that the courts below erroneously took the position that the failure to call Zainuddin was not fatal as he was not present with both the accused when they were arrested. The prosecution had failed to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of arrest. No explanation whatsoever was offered by the prosecution as to what had happened to the vehicle from the date when the second accused was summoned in Kulim, Kedah up to the date when the vehicle was stopped at the road block. There was no evidence to indicate for how long both the accused had been in possession of the vehicle.

[43] In the final analysis, this court held that the mere fact that the second accused was found in the vehicle and that he was previously summoned for driving the same vehicle approximately six months prior to the date of arrest were insufficient for the court to make an inference that he had all the time exclusive custody or control over the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody or control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them. There was nothing to suggest as to what happened to the vehicle in between that period he was summoned in Kedah until the date of his arrest in the present case. Thus, this court found that there was no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest.

[44] We have deliberated on the case of *Ibrahim bin Mohamed*. Upon a perusal of the material facts in the case of *Ibrahim bin Mohamed*, it is apparent that that case is peculiar to its set of facts, which are clearly at variance with the facts of the present case. In *Ibrahim bin Mohamed*'s case, this court was hesitant in convicting both the accused on the trafficking charges in view of the lack of evidence regarding mens rea possession. The prosecution's case there rested on only two pieces of evidence: that they had custody and control over the vehicle at the time of arrest and that they fled upon the vehicle being stopped by the police.

[45] In our view, there were other facts in that case which distinguished it from *Public Prosecutor v Denish a/l Mahadevan*. Firstly, on the facts, both the accused had only a momentary possession of the vehicle containing the drugs. There was no evidence that they had, at any time, custody or control over the vehicle except for that one drive in which they were apprehended. The only other time the second accused was shown to have had custody or control over the vehicle was when he was driving the same vehicle some six months prior to the arrest. Custody or control over the vehicle (which was not registered in either of their names) over the six-month period was not accounted for by the prosecution. Nor was the cannabis found in the car in plain sight. Thus, a combination of those facts (or lack of facts) led this court to substitute the conviction under s 39B of the DDA with one of possession under s 6 punishable under s 39A(2) of the DDA, and rightly so in our opinion.

[46] *Ibrahim bin Mohamed*'s case cannot therefore be used as an appropriate comparable to the appellant's case before us given the overwhelming evidence against the appellant. Thus, on this ground of appeal, we are not persuaded by the arguments of learned counsel for the appellant.

Issue 2

The prosecution's failure to call or explain the non-calling of Javad @ Hasan Tiren and Samaneh Momen

[47] Learned counsel for the appellant submitted that the prosecution's failure to call or explain the non-calling of Javad @ Hasan Tiren and Samaneh Momen had resulted in 'huge gaps' in the prosecution's case. In light of this, learned counsel submitted that an adverse inference pursuant to s 114(g) of the Evidence Act 1950 should be invoked against the prosecution.

[48] The law pertaining to s 114(g) of the Evidence Act 1950 is settled. Under s 114(g) of the Evidence Act 1950 the court may presume that evidence which could be and is not produced would if produced be unfavorable to the person who withholds it. The usage of the word 'may' gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference. To draw an adverse inference against the prosecution the court must be satisfied that the witness that was not offered was a material witness, the prosecution purposely withhold evidence which it possessed and which was always available; and that what the prosecution did was done with an ulterior motive to frustrate the defence' (*Nanda Kumar a/l Kunyikanan & Anor v Pendakwa Raya* [2011] MLJU 1566; [2011] 8 CLJ 406).

[49] The aforesaid authority above set out is the correct position of the law, that is, court will not invoke an adverse inference against prosecution if it believes that the facts and/or the prosecution's reasons for not calling the supposed material witnesses show no cause for it. Moreover, the prosecution only needs to produce witnesses who are necessary in the unfolding of its complete narrative, that is, to prove the essential elements of the crime and in this case, custody, control, and knowledge. Applying the above principles to our present case, we are satisfied that there was no evidence to suggest even the slightest inkling that the prosecution withheld testimonies by Javad @ Hasan Tiren and Samaneh Momen in a deliberate scheme to impair the truth or frustrate the appellant's defence.

[50] Further, in the case of *Siew Yoke Keong v Public Prosecutor* this court had succinctly laid down that witnesses for prosecution are indispensable only insofar as they are necessary in establishing a prosecution's case beyond a reasonable doubt. Thus, any calling of witness beyond that minimum requirement is within prosecutorial discretion. In the end, it is the sufficiency of the evidence that matters. As long as there are no 'unsatisfactory features or gaps in the prosecution's case, an order of adverse inference is not imperative. It is our view, on the facts of this case, adverse inference under s 114(g) of the

Evidence Act, could not be invoked against the prosecution.

Issue 3

Failure and/or improper application of the *Radhi* direction

[51] The third issue raised by learned counsel for the appellant was that the Court of Appeal failed to apply and/or applied improperly the *Radhi* direction which was propounded by the then Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 207. In order to appreciate what was held by the Supreme Court on what is now called '*Radhi* direction', it is necessary for the full facts of the case be appreciated.

[52] In *Mohamad Radhi* the accused was convicted and sentenced to death by the High Court on a charge of trafficking in 544.18g of cannabis on 12 July 1986 at about 1.20am at Kampong Tengah of Batu Kikir, in the District of Jempol, in the State of Negeri Sembilan Darul Khusus. In convicting the accused the learned trial judge had accepted the prosecution evidence which are as follows. On 11 July 1986 at about midnight four police officers led by Insp Zabidi ('PW2') were on motorcycle crime prevention patrol at Kampong Tengah, Jempol. At about 1.20am (12 July 1986) as they were leaving the kampung road for the main road, they came across the accused walking with another man identified as one Hashim. They stopped them and at the material time the accused was carrying a sling bag across his shoulders. When PW2 identified himself as a police officer, Hashim ran away while the accused threw the bag he was carrying into the paddy field by the side of the road. Despite being pursued by the police, Hashim apparently managed to escape and could not be traced until the trial, but the accused was apprehended after a short struggle although he denied trying to run away.

[53] From the evidence of the government chemist, Mr Ho Peng Hee (PW2) it was established beyond doubt that the 1,773 paper rolls carried by the accused contained 544.18g of cannabis. The prosecution relied on the statutory presumption under that the accused being in custody or control of the bag containing the dangerous drug should be presumed, until the contrary was proved, to have been in possession of such drug, and also should, until the contrary was proved, be deemed to have known that the drug was cannabis. Since the quantity of cannabis recovered exceeded 200g, the prosecution also relied on the statutory presumption under s 37(da) of the DDA to prove that the accused was trafficking in the said dangerous drug (this case was decided before *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. At that point of time, the invocation of presumption upon presumption was permissible).

[54] When the defence was called the accused gave evidence on oath and called eight other witnesses. It was the defence case that Hashim was the owner of the bag containing the cannabis and that accused was merely an innocent and momentary carrier of the bag. It was Hashim and not him who was trafficking in the said cannabis. The accused father (DW4) and mother (DW5), gave evidence to corroborate his story that Hashim was in their house that night watching television until 11pm when Hashim and the accused left the house to buy cigarettes.

[55] It was the defence case that on arrival near the shop, Hashim and the accused went to purchase cigarettes. There Hashim approached a group of three persons — DW6, DW7 and DW8 who were then sitting under a tree. When the accused came out of the shop, he approached the three persons, one of whom was his own brother (DW7) and was informed that Hashim had gone away for a while on a motorcycle borrowed from one of them. So the accused waited there for Hashim to return and had a chat with the three persons. After about one and half hours later Hashim returned and was seen carrying a bag. The accused and Hashim then walked back to the accused parent's house. On the way, Hashim wanted to urinate and asked the accused to hold the bag for him. It was soon after this that police appeared on their motorcycles. The accused saw Hashim running away and he himself felt frightened and threw the bag away, but denied attempting to run away. After his arrest the accused took the police to his parents' house where the police made a search and recovered clothing belonging to Hashim.

[56] The shopkeeper Mustaffa bin Yusof (DW3), confirmed that the accused did come and buy some cigarettes from his shop that night. ASP Mohd Hanafiah bin Ismail (DW2) of the Anti-Narcotics Special Branch also testified of the abortive police attempts to trace the whereabouts of Hashim. There was however no dispute that at the time of the appellant's arrest, he was in the company of Hashim. In short Hashim was not a fictitious person.

[57] The last defence witness was Norazam bin Mohamed (DW9). He testified that he was arrested the same night for possession of cannabis which he had purchased from Hashim. Fifty rolls of cannabis were sold to him on 11 July 1986 at about 5pm. The notes of evidence showed that in the course of cross-examination, the deputy public prosecutor had referred him to his previous statement to the police, but nothing further was done to impeach his credit, with the result that his evidence remained admissible for consideration by the learned trial judge on the issue of who was actually trafficking in cannabis on the night of 12 July 1986. The fact that Hashim was trafficking in drugs when he sold cannabis to Norazam was not seriously challenged; nor the fact of Norazam's arrest for possession of cannabis.

[58] In dealing with the defence, the learned trial judge stated in his grounds of judgment as follows:

> The court has taken time to consider very carefully all the evidence in its entirety. The onus on the defence is to rebut the statutory presumptions on the balance of probability, especially the presumption under *s 37(d)* the presumption of possession and knowledge of the nature of the drug. Defence need not rebut the trafficking presumption of s 37(da) if defence has succeeded in rebutting the presumption of s 37(d). The defence can also raise a reasonable doubt where possible in the prosecution's case to be entitled to an acquittal.

[59] Further down the learned trial judge continued:

> Was accused telling the truth? Were the three people (DW6, DW7 and DW8) sitting under the ketapang tree telling the truth? It is purely a question for the court to evaluate the evidence and make a finding on who are telling the truth and who are not telling the truth.

[60] Therein lies the problem. Before the Supreme Court learned counsel for the accused raised the issue that the falsity of the defence did not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The then Supreme Court agreed with his submission. The Supreme Court held that whenever a criminal case decided on the basis of the truth of the prosecution case as against the falsity of the defence story, it is incumbent on a trial judge, in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263 even though is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, what is important is not the words used by the judge but rather the actual application of the test to the facts of the case.

[61] In *Mohamed Radhi* , the learned trial judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state that the duty placed by the law on the defence to earn an acquittal. The Supreme Court held that this was a misdirection on the part of the learned trial judge. In elaborating on this point, the then Supreme Court pointed out the misdirection committed by the learned trial judge which is apparent from paras 115–116 of his grounds of judgment. In elaborating the above misdirection, the then Supreme Court held at paras 171–172 that:

> The other crucial issue which had arisen in this appeal was the manner in which the learned judge had approached the law on the right of the appellant to rebut the two applicable statutory presumptions under the Dangerous Drugs Act 1952. In the penultimate paragraph of his grounds of judgment the learned judge said at pp 115–116:
>
> > It is a finding of fact that the defence has not rebutted the statutory presumption

> of s 37(d) on the balance of probability at all *and it follows that presumption of s 37(da) is also not rebutted.* Nor has the defence raised any reasonable doubt in the prosecution case. And it is a finding of fact that the prosecution's case against the accused has been proved beyond any reasonable doubt. (Emphasis added.)

Whilst we could not disagree with what the learned judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s 37(d), there was no need to rebut the presumption of trafficking under s 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability in the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

On the issue of trafficking, we found the learned judge had failed sufficiently to consider the evidence of defence witnesses, particularly that of DW9 which clearly indicated that on the night in question Hashim was in all probabilities the trafficker of the cannabis. In our view, the learned judge had acted on the wrong premise that once the appellant had failed to rebut the presumption under s 37(d), the presumption under s 37(da) became irrebuttable so as to relieve the court from the duty to consider separately on balance whether the presumption under s 37(da) had been rebutted. In our view, on the facts of this particular case, this error of law had occasioned a miscarriage of justice.

[62] Guided by the dicta of the then Supreme Court in *Mohamed Radhi*, it is clear to us that unless the evidence in a particular case does not obviously so warrant, *it is incumbent for the court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) of the DDA as a separate exercise even though the court is satisfied on a balance that the presumption of possession under s 37(d) of the DDA has not been rebutted.* This is basically the gist of what the then Supreme Court had meant when it was referring to a separate exercise. In the final analysis, the Supreme Court held that the failure to do so on the part of the trial judge was a material misdirection and was fatal to the conviction. The dicta, postulated in *Mohamed Radhi*, which is now known as the *Radhi* direction is sort of a direction the trial judge administers unto himself when the accused person invokes the defence which demonstrates the presence of another person at the scene of the crime who is the trafficker as opposed to the accused person who is entirely innocent. Based on the said direction it is incumbent on the learned trial judge at the end of the defence case, to examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, whether the defence story casts a reasonable doubt on the prosecution case. This principle is concomitant to the principle laid down in *Mat v Public*

Prosecutor [1963] 1 MLJ 263.

[63] At a glance, it appears that the *Radhi* direction is not entirely difficult to comprehend and poses no problem of interpretation. In practice, however, we find, with respect, it has been misinterpreted and misapplied by our courts. Judicial opinion emanating from the two Court of Appeal cases on *Radhi* direction seem to suggest that the *separate exercise* postulated in *Mohamad Radhi* means first to determine as a fact whether that the other person is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. If, the trial judge finds that that other person to be real the judge must then determine whether that other person is the *real trafficker*. In *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538; [1995] 3 CLJ 371, *Gopal Sri Ram JCA (as he then was)* in referring to *Mohamad Radhi* and coining the direction as 'the *Radhi* direction' stated that:

> We agree with Encik Karpal Singh that the judgment when, read as a whole reveals no separate exercise as that postulated by the decision in *Radhi*. We also agree with his submission that the use of the plural expression 'presumptions' by the learned judge in the passage we have reproduced a moment ago does not amount to a sufficient compliance of what we will call 'the *Radhi* direction'.
>
> The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any reasonable doubt raised that Smith was the *real trafficker*. Had he done so he may well have held that he was not, in which event our task would have been made that much easier. Unfortunately he did not and it is our view that the failure by the learned judge to administer into himself the Radhi direction renders his ultimate conclusion fatally flawed.
>
> In our judgment, the failure of a judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-direction or a misdirection by a judge to a jury. *Rameshwar v State of Rajasthan* AIR 1952 SC 54, *Tan Yook Suan v Regina* [1954] 1 MLJ 116 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr SCJ (now FCJ) stated the principle in the following words:
>
> > Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction, amounts to a misdirection, for in the words of Pickford J in R v Bundy ... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Before us, the learned deputy fairly, and quite properly, conceded that the learned judge was duty bound, in the light of his earlier finding, to administer unto himself the *Radhi* direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

[64] In another case, *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 2 MLRA 382, Gopal Sri Ram JCA (as he then was) again in referring to the Court of Appeal's earlier decision in *Sochima Okeye*, reiterated that:

[12] ... In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v Public Prosecutor* [1991] 3 MLJ 169. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538.

[65] Both the above cases are instances where the Court of Appeal had with respect, in our view had misconstrued what the then Supreme Court meant by separate exercise. We are of the view that the separate exercise is surely not an exercise to determine the *real trafficker*, but as stated in *Mohamad Radhi*, the separate exercise is an exercise by *the court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) of the DDA as a separate exercise even though the court is satisfied on a balance that the presumption of possession under s 37(d) of the DDA has not been rebutted.* This certainly has nothing to do with the court having to determine the real trafficker. We observed that the earlier cases above mentioned have, with respect, misapplied the *Radhi* direction. The interpretation circumscribed by the earlier two cases has no juridical foundation and is not altogether reconcilable with the position as postulated in *Mohamed Radhi*.

[66] Now reverting back to the present case, for the reasons we have stated in the preceding paragraphs, we find that the Court of Appeal was right in emphasising in its judgment that the interpretation of s 39B(2) of the DDA does not require the court to consider the issue of a 'real trafficker' as it is only concerned with whether or not the appellant himself is a trafficker. The Court of Appeal further expounded the fact that someone else may have been

involved in the act of trafficking in question is irrelevant in determining whether the accused is or is not a trafficker for the purposes of s 39B(2) of the DDA. This was however done by the Court of Appeal without any mention of the *Radhi* direction or the steps to be undertaken to determine the appellant's culpability.

[67] The pertinent question issue now is *whether the appeal ought to be allowed by reason of the Court of Appeal's failure to direct their learned minds to the Radhi direction*? Our answer to this issue is in the negative. It is trite law that a court which hears an appeal shall ordinarily set aside a conviction and allow an appeal where an accused has been deprived of a rule of law operating in his favour (*Chiu Nang Hong v Public Prosecutor* [1963] 1 MLJ 119). However, in such a case, the court is not invariably bound to decide in favour of the appellant but retains a 'discretion' to dismiss the appeal if, despite the deprivation, it is of the opinion that no substantial miscarriage of justice has occurred.

[68] This discretion accorded to an appellate court is codified in the Courts of Judicature Act 1964, specifically, s 92(1) which was successfully applied in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2000] 1 MLRA 800. In that case, the appeal was dismissed despite a misdirection at law as it was decided that no substantial miscarriage of justice was occasioned given the court's satisfaction that a reasonable tribunal would have convicted the accused on the available evidence even if the proper direction at law had been administered. The then Supreme Court in *Tunde Apatira & Ors v Public Prosecutor* has laid down the following important principle:

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception.

[69] The above is further strengthen by the proviso to s 60(1) of the Courts of Judicature Act 1964 which provides as follows:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[70] Thus, going by the principles propounded in *Mohamad Radhi*, even though a judge does not accept or believe the accused explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution's case. The

then Supreme Court in *Mohamad Radhi* highlighted that the words used by the judge in his grounds of judgment must state the actual application of the test to the facts of the case, ie whether the accused had failed to cast a reasonable doubt on the prosecution case. The trial judge in *Mohamad Radhi* unfortunately had only stated that the defence can also raise a reasonable doubt where possible in the prosecution's case to be entitled to an acquittal, without stating his finding using the right test on whether the accused has failed to cast a reasonable doubt on the prosecution case. The then Supreme Court had found this as a misdirection by the learned trial judge and was fatal to the conviction.

[71] In the present case after much deliberation, we are of the opinion that even if the Court of Appeal had administered the *Radhi* direction correctly, the evidence available fails to rebut the trafficking presumption under s 37(da) on a balance of probabilities, that the appellant was simply a victim of unfortunate circumstances and a mere possessor, whilst Javad @ Hasan Tiren was the trafficker of all the drugs found at the said premises. The only evidence advanced by the appellant in proving its case that Javad @ Hasan Tiren was the 'trafficker' is as follows. Firstly, that Javad was the one who had taken out the tenancy of said premises (his name was printed on the tenancy agreement) and thus the drugs found naturally belonged to him. Secondly, that Javad was detained in Simpang Renggam for drug-related offences and released therefrom on 16 June 2013.

[72] Whilst there was no dispute on the existence of Javad @ Hasan Tiren, we fail to see how the mere fact that Javad was the official tenant could exonerate the appellant of the charge of trafficking of the said drugs. Based on the testimony by PW7, the appellant was in fact present when the tenancy agreement was signed. Secondly, the appellant had unencumbered access to and from the premises when and where the drugs were found. This is supported by PW10's testimony that the appellant had entered and left the said premises alone and that the access card and key to the said premises were found in the sling bag belonging to the appellant. The appellant was also found alone in the presence of 49,621.8g of methamphetamine (a manifestly higher quantity of drugs than for consumption), where most of the drugs were in plain view of the appellant. These facts, coupled with the finding of two weighing scales and the drugs found in open condition on the aluminum foil in the first bedroom are all convincing pieces of evidence which weighed against the appellant.

[73] At this juncture, it is apt to compare the circumstances of the current case to that of *Mohamed Radhi*. Whilst in both cases the existence of the alleged 'trafficker' was undisputed, in *Radhi*'s case, Hashim (the alleged trafficker) was present immediately prior to the *Radhi*'s arrest. In this case, Javad @ Hasan Tiren, whilst not a fictitious person, was clearly not present. In fact, no evidence was given to show that Javad @ Hasan Tiren was present at any time

during the appellant's stay at the said premises. If Javad @ Hasan Tiren was occupying the premises as his own, is it not reasonable to infer that he would have been present at least some time during the appellant's stay? In any case, no explanation was given by the appellant for Javad's absence during his stay. Moreover, in *Mohamed Radhi* multiple witnesses gave testimony that the bag containing the drugs belonged to Hashim, not Radhi. The witnesses' testimony supported the evidence of Radhi. In the present case, there was no single corroborating witness to the appellant's contention that Javad @ Hasan Tiren was the owner and hence the trafficker of the drugs.

[74] Another key fact of differentiation in *Mohamad Radhi*'s case was the testimony by one Norazam who was apprehended for possession of cannabis sold to him by Hashim that very same night. Whilst Javad @ Hasan Tiren was said to have been released from Simpang Renggam approximately two years after the appellant's arrest in 2011 for drug-related offences, it is made unclear by appellant's counsel as to what those drug offences entailed, when his arrest happened, and whether or not it was in connection with the appellant at all. The appellant had failed to establish any nexus between Javad's offence and his own, save for its mere connection with drugs.

[75] Learned counsel for the appellant also relied heavily on the case of *Yee Wen Chin v Public Prosecutor*. The relevant facts in *Yee Wen Chin v Public Prosecutor* was this. On 29 June 2001, at about 2.30pm Chief Insp Roslan bin Hussin ('PW5') acting on information that he received, took a team of police officers to an apartment block at Taman Miharja. On arrival the police personnel took their position near a parking lot close to Lot 25 B1, Condo Sri Miharja. After about 30 minutes had passed, PW5 saw a Chinese male, later identified as the accused, emerge from block 25 B 1. He saw the accused heading towards a motorcar No WFP 2429. According to PW5 and his fellow officer PW6 (Detective Sub-Insp Teoh Soy Lim) the accused carried a red plastic bag (exh P15) in his left hand. The accused then entered the car which was proven to belong to him. At this juncture, PW5 and his team went to the car, asked the accused to get out of it and identified themselves as police personnel. The car was searched. The police recovered a red plastic bag from the front passenger's seat. The bag was opened and from it was recovered a package wrapped in a Chinese newspaper (exh P16) and a box containing something wrapped in a coloured wrapper (exh P17). Subsequent chemical analysis of the material found in these two packages showed that exh P16 contained 1,000 pills of methylenedioxymethamphetamine (exh P19 and exh P21) and exh P17 contained 1,000 pills of the same drug (exh P23), a proscribed drug under the DDA. The accused was later charged and tried for two offences: first, for trafficking in exh P19 and P21 under s 39B(1)(a) of the DDA, second for being in possession of exh P23 under s 12(2), punishable under s 39A(1) of the DDA.

[76] At the close of the case for the prosecution the learned trial judge held that a prima facie case of trafficking had not been made out on the first charge. He accordingly reduced the first charge to one of possession and called upon the accused to make his defence to both charges. At the conclusion of the whole case, the accused was convicted and sentenced to 13 years imprisonment in respect of the first charge and two years in respect of the second charge. The sentences were ordered to run consecutively.

[77] The public prosecutor being dissatisfied with the reduction of the original first charge appealed. The accused also being dissatisfied with the learned trial judge's decision had appealed asking for his conviction to be quashed on both charges. The issues before the Court of Appeal were whether the prosecution had at the close of its case established a prima facie case of trafficking on the first charge and whether at the close of the whole case the learned trial judge was correct in finding the accused guilty of possession of the drugs set out in both charges.

[78] On the first issue the Court of Appeal found that the prosecution had not on a maximum evaluation of its evidence at the close of its case established a prima facie case of trafficking. The Court of Appeal reasoned its finding based on the failure of the prosecution to miss out a critical point. PW5 omitted to mention in the police report after the accused's arrest that the accused was carrying exh P15 when he emerged from the apartment block in question. The public prosecutor had also failed to allude to this fact in his opening statement. This fact was only divulged during the examination in chief of PW5. Thus, the Court of Appeal found the omission of this fact was critical to establish the element of trafficking, thus leaving the evidence for the prosecution in doubt of whether the accused had indeed carried exh P15 to his car with a view of driving off with the offending exhibits.

[79] Further the accused in that case was accorded the benefit of innocence as in the course of cross-examining by the prosecution it was extracted that PW5 had received information that it was one Woo Kok Meng who was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo Kok Meng was the real trafficker and that the accused was entirely innocent. The learned trial judge disregarded this piece of evidence as inadmissible under s 40 of the Evidence Act. The Court of Appeal however reversed the trial judge's findings and held that the accused was clearly entitled to do this in view of the decision in *Mohamad Radhi*.

[80] In *Yee Wen Chin*, the *Radhi* direction was successfully applied primarily because the prosecution's witness himself (PW5) had revealed that police information received singled out one Woo Kok Meng as the trafficker, not the

accused. Hence, in that case, it was more probable to accept the accused's version that he was a mere possessor and innocent of trafficking, whilst Woo Kok Meng was the trafficker. On those very facts, that case can be easily be distinguished from the appellant's case before us. Nowhere does the evidence in the present case suggest that Javad @ Hasan Tiren or any other person for that matter was the initial focus of the police investigation, and that the appellant was merely at the wrong place, at the wrong time.

Issue 4

Misdirection in the handling and application of presumptions under the Dangerous Drugs Act 1952

[81] The gist of the submission of learned counsel for the appellant is that there were uncertainties as to the right presumption which was relied upon by the learned trial judge as well as the Court of Appeal. To this end, learned counsel emphasised that nowhere it was shown that the learned trial judge relied on the presumption under s 37(d) of the DDA to presume knowledge. Learned counsel mounted a similar attack on the judgment of the Court of Appeal. According to learned counsel, the Court of Appeal was vague as to whether the case was one of actual possession/trafficking or presumed possession or trafficking.

[82] We have deliberated on this issue and with respect, we found no merit in learned counsel's argument. We have read the judgment of the Court of Appeal in its entirety and we are satisfied that the Court of Appeal had referred time and time again to the prosecution's proof of actual knowledge. In fact in its finding, the Court of Appeal in no uncertain terms had stated the following:

> [23] Dalam kes ini, dapatan-dapatan fakta yang dibuat oleh hakim bicara, terutama dapatan beliau *bahawa perayu mempunyai pengetahuan tentang dadah tersebut* dan perayu gagal mematah anggapan mengedar di bawah s 37(da)(vi) ADB disokong sepenuhnya oleh keterangan.

[83] The above finding was based on the objective assessment of facts. The Court of Appeal being an appellate arbiter took pains to analyse the judgment and findings of the High Court on knowledge and presumption of trafficking under s 37(da) of the DDA.

[84] Contrary to what was submitted by learned counsel for the appellant, we find that there was no misdirection on the part of the learned trial judge in handling and applying the presumptions under the DDA.

CONCLUSION

[85] Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned trial judge and the judgment of the Court of Appeal, we were entirely satisfied that the appellant's conviction was safe. In the result, the appellant's appeal was dismissed. Accordingly, we affirmed the conviction and sentence.

Appeal dismissed; conviction and sentence affirmed.

Reported by Dzulqarnain Ab Fatar